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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JESSE C. HARRIS Petitioner v. THE UNITED STATES OF AMERICA Respondent	NO. _____ PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Did the procedure adopted by the Department of the Army for rotating overseas-employed civilians back to the United States, as applied in this case, violate 5 CFR 752.202(b)?

2. Did the procedure adopted by the Department of the Army for rotating overseas-employed civilians back to the United States, as applied in this case, violate the Army's regulations at DACPR 352.8?

3. Are the Department of the Army regulations governing the rotation program applicable to overseas-employed civilians, DACPR 352.8, as promulgated and applied herein, beyond the authority granted in the enabling statute, 10 U.S.C. §1586?

4. Did the Court of Claims err in holding the petitioner failed to comply with the Army's regulations regarding the procedure to exercise re-employment rights?

5. Did the Army abuse its discretion in

removing Mr. Harris from the federal service under the circumstances of this case?

II. TABLE OF CONTENTS

		PAGE
I.	Questions Presented for Review	i
II.	Table of Contents	iii
III.	Table of Authorities	iv
IV.	Court of Claims and Administrative Decisions	v
V.	Statement of Grounds on Which the Jurisdiction of the Supreme Court is Involved	vi
VI.	Exposition of Statutes and Regulations Involved	vii
VII.	Statement of the Case	1
	A. Facts	
	B. Basis of Jurisdiction in the Court of Claims	11
	C. Argument	11
	D. Conclusion	29
VIII.	Appendix	A-1

III. TABLE OF AUTHORITIES

Constitution

U.S. Constitution, Amendment V

Statutes

5 U.S.C. §5596 (1976 ed.)

10 U.S.C. §1586 (1976 ed.)

28 U.S.C. §1255

28 U.S.C. §1491

Regulations

5 CFR 752.202(b)

Department of the Army Civilian Personnel Regulations 272.2 and 352.8

Legislative History

1960 U.S. Code Cong. and Ad. News, p. 2670-71

Report of Hearing before House Committee on Post Office and Civil Service, H.R. 10695 and H.R. 10829, 86th Congress, 2d Session, March 25, 1960

Cases

Federal Maritime Commission v. Anglo-Canadian Shipping Company, 335 F2d 255 (9th Cir. 1964)

Guyer v. Cities Service Company, 381 F. Supp. 7 (D. Wis. 1974)

Murray v. United States, 154 Ct.Cl. 185 (1961)

Power v. United States, 209 Ct. Cl. 126, 531 F2d 505 (1976)

Service v. Dulles, 354 U.S. 363 (1957)

Watson v. United States, 142 Ct.Cl. 749 (1958)

IV. COURT OF CLAIMS AND ADMINISTRATIVE DECISIONS

The decision of the United States Court of Claims upon which review is sought was Jesse C. Harris v. The United States, No. 383-79C, decided January 28, 1981. A copy of this decision is in the Appendix hereto as Item 1.

The decision of the Court of Claims was upon review of the decision of the United States Civil Service Commission Federal Employee Appeals Authority, Appeal of Jesse C. Harris, Decision Number DC752B80356, decided September 6, 1978. A copy of this decision is in the Appendix hereto as Item 2.

V. STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOLVED

This petition is presented under the authority granted in 28 U.S.C. §1255.

VI. EXPOSITION OF STATUTES AND REGULATIONS INVOLVED

A. 5 U.S.C. §5596 (1976 ed.)

§5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means--

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of

the employee--

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall

prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

B. 28 U.S.C. §1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United

States. To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just.

Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to maned or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority.

C. 28 U.S.C. §1255

§1255. Court of Claims; certiorari; certified

questions

Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant;

(2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question.

D. 10 U.S.C. §1586

See Appendix, Item 4.

E. 5 CFR 752.202(b)

(b) Employee's answer. Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the

employee ample opportunity to review the material relied on by the agency to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in wirting.

* * *.

F. Department of the Army Civilian Personnel Regulations (DACPR) 272.2 and 352.8

See Appendix, Item 3.

VII. STATEMENT OF THE CASE

A. FACTS

Jesse C. Harris, the Petitioner herein, was removed on May 13, 1977, from his full-time position as a civilian employee of the Department of the Army, with a duty station in West Germany with the U.S. Army communications-Electronics Engineering Installation Agency-Europe. He held a GS-12, Step 7, position with an annual salary of $24,528.00 per annum. At the time of his removal, Mr. Harris was a preference eligible veteran who had served with the Federal Government for just a few days short of twenty years.

The Army has alleged that it removed Mr. Harris because he failed to return to the continental United States when ordered to do so by the Army. Mr. Harris had valid and substantial reasons for requesting of the Army that he remain in his position in Germany, as the facts set out below from the administrative record show.

There is no allegation that Mr. Harris was not satisfactorily performing his duties for the Federal Government. Indeed, Colonel O'Brien stated that: "***he was a fine worker. I have no objection with anything he did. I was not trying, in other words, to pass on a man that was not capable of doing the job, he did a fine job, no argument there." (Transcript of hearing before Martha W. Rousos, U.S. Civil Service Commission, December 13, 1977, Page 11. Hereinafter such cites will be given as "Tr. 11." This transcript is reproduced as Part II of the Administrative Record before the Court of Claims.)

The law in issue involves the rotation system for overseas assignment and return for civilian employees of the various military departments. The statute involved is 10 U.S.C. §1586. The regulations involved are the Department of the Army Civilian Personnel Regulations (hereinafter DACPR), in particular DACPR 352.8, which is entitled "Oversea

Reemployment Rights." The basic thrust of the statute and regulations is to provide employees with reemployment rights upon their return from abroad. The Army removed Mr. Harris based on its contention chat Mr. Harris failed to exercise those reemployment rights.

This case arose under the facts as presented below. On January 5, 1972, Mr. Harris signed a five-year tour of duty Agreement, and on May 1, 1975, he signed a Supplement. Under these Agreements, his tour of duty and reemployment rights under 10 U.S.C. §1586 and the implementing regulations at Department of the Army Civilian Personnel Regulations 352.8 were to expire on January 17, 1977.

The dilemma in which Mr. Harris found himself with the Army arose as a result of his September 30, 1976, marriage to Mrs. Harris, who is a citizen of Syria and a medical doctor educated in the Soviet Union. Tr. 11. On October 5, 1976, Mr. Harris went to Frankfurt and applied for a permanent immigration visa

for his wife to accompany him upon his return to the United States. At that time he was told he would need certain documents on his wife from Syria and the Soviet Union. Despite the earnest efforst of Mr. Harris and his wife, Tr. 11-12, 18, 20-21, it soon became apparent that the required documentation was not forthcoming from the Soviet Union and Syria, Tr. 18, and as his tour of duty began to draw to an end, he was faced with the painful choice of either returning to the United States in order to keep his job, and thereby leaving his wife by herself in Germany, or remaining with his wife and thereby losing his job.

As a result, on December 1, 1976, Mr. Harris requested by letter that his job be extended for 120 days in order for him to obtain the immigration documents for his wife. By letter of December 6, 1976, Colonel George F. O'Brien granted Mr. Harris a delay in travel for thirty days, through February 17,

1977, "based on personal hardship." As events transpired, Mr. Harris remained in his Army job until May 13, 1977, when he was separated.

The December 6, 1976, letter from Colonel O'Brien required that by February 1, 1977, Mr. Harris present "documents that will support your efforts to obtain the v[i]sa in a timely manner" in order for that officer to entertain a request for a further delay. At some time around February 1, 1977, Mr. Harris met with Colonel O'Brien and Mr. Hanson to discuss the matter of the extension. The parties to that meeting have differing recollections of what was said and intended at that meeting, Tr. 20-23, 70-71, 79, but there is no dispute over the fact that at a minimum Mr. Harris explained that he would not rotate back to the United States until he had "all the documentation to support [his] wife's going." Tr. 22.

Thereafter, by letter of February 24, 1977 (Appendix, Item 5), from Major A. R.

Pettingill, the Army imposed the conditions on Mr. Harris that unless he made a written request for transportation and travel orders, or unless he reported to a personnel office to make such arrangements, such failure would "be construed as a refusal to accept assignment to your former position in CONUS [continental United States], and that "[s]uch action on your part will result in a proposal to separate you from the federal service." The February 24, 1977, letter also granted Mr. Harris the right to exercise his reemployment rights by taking the aforementioned actions prior to March 7, 1977.

On March 2, 1977, Mr. Lutz B. Hoernecke, Mr. Harris' counsel in Germany, wrote a letter to Major Pettingill noting that Mr. Harris was "prepared to return to a suitable government position in the United States," but that the previous thirty (30) day delay in travel was insufficient. The letter further stated:

> We therefore request a further delay of 90 days to provide adequate time to procure the necessary documentation. The documentation which must be obtained includes educational certificates from the Soviet Union and evidence of good conduct from the authorities in the above referenced country. All of these documents must be translated by a certified translator.

Colonel O'Brien responded to the March 2, 1977, request by letter of March 21, 1977, which stated that Mr. Harris would haveto comply with the conditions of the February 24, 1977, letter before any further requests for a delay would be considered.

In the interim, by letter of March 18, 1977, from Major Pettingill, the Army issued a proposal to remove Mr. Harris from the federal service, again noting that Mr. Harris had not satisfied the requirements demanded in the letter of February 24, 1977. By counsel's letter of March 30, 1977 (Appendix, Item 6), Mr. Harris replied in detail to the March 18, 1977, letter of proposed removal stating his reasons for needing a further extension. On April 18, 1977, Colonel O'Brien

replied (Appendix, Item 7) to Mr. Harris' March 30, 1977, letter once again stating that Mr. Harris had not met the conditions of the February 24, 1977, letter, and stating Colonel O'Brien's opinion that Mr. Harris had refused to accept assignment to return to his former position in the continental United States in accordance with the terms of his reemployment rights agreement, thereby allowing his removal from the federal service.

Under 5 CFR 752.202(b), which governs procedures in adverse actions against federal employees, an employee must be given time to answer a notice of proposed removal, and "[i]f the employee answers, the agency shall consider his answer in reaching its decision." [emphasis supplied] Despite the clear mandate of this regulation, Colonel O'Brien in his April 18, 1977, memorandum said:

> Paragraphs 2 and 3 of ref 1c above explained the rationale and preliminary requirements which Mr. Harris had to meet before any further request(s) for delay in travel beyond the 30-day extension would be considered, i.e.,

> application to exercise his reemployment rights to return to CONUS by submitting to CPO the completed request for travel orders and signing any other required documents, (e.g., a minimum one year transportation agreement). The required actions described above which Mr. Hess [sic] was directed to complete in response to ref 1a were not accomplished by him.

Reference 1c to which Colonel O'Brien referred was a March 21, 1977, letter to Mr. Harris from Colonel O'Brien which said:

> Requests for approval of delayed travel because of an employee's personal reasons may be considered once the employee has made application to exercise his reemployment rights and return to his former position in CONUS. The procedure for this action was specified in para 3F of my 24 February 1977 letter. Once you have accomplished these actions, your request for further delayed travel will be considered, provided that you furnish the justifiable reasons for the request.

Neither 5CFR 752.202 nor DACPR 352.8 provide any authority for an Army official to place such conditions upon Mr. Harris as a prerequisite for obtaining consideration of his Answer of March 30, 1977, stating his need for an extension of duty as a defense to the removal proposal. There is no provision

in DACPR 352.8 allowing for the Army official to demand of Mr. Harris that he make a request for travel and transportation orders prior to the Army's considering his request. The procedure demanded by Colonel O'Brien was apparently made up out of the imagination of the Army officials responsible for the rotation program.

Mr. Harris was removed from the federal service effective May 13, 1977, pursuant to Colonel O'Brien's removal letter of April 29, 1977.

By letters of May 20, 1977, and July 15, 1977, Mr. Harris, by Mr. Hoernecke, appealed the Army decision and requested a hearing before the Civil Service Commission. The hearing was held on December 13, 1977, before Martha W. Rousos, Assistant Appeals Officer for the Federal Employee Appeals Authority. Ms. Rousos' decision was rendered on September 6, 1978, and held for the Army. (Appendix, Item 2).

Petitioner appealed the cause to the Court of Claims, which on January 28, 1981, ruled for the Army. (Appendix, Item 1).

B. BASIS FOR FEDERAL JURISDICTION

This action was brought in the Court of Claims under the Tucker Act, 28 U.S.C. §1491 (1976 ed.), seeking reinstatement and back pay pursuant to the Back Pay Act, 5 U.S.C. §6696 (1976 ed.).

C. ARGUMENT

1. The procedure adopted by the Department of the Army for rotating overseas employed civilians back to the United States, as applied in this case, violates 5 CFR 752.202(b).

The question appears, based on research done by counsel for Petitioner, to present a case of first impression before the federal courts. Many federal employees are involved in overseas armed services employment, and this question thus presents a federal law question of substantial importance in that respect.

The regulations governing adverse actions gave Mr. Harris the absolute right to have his letter of March 30, 1977, objecting to his proposed removal considered during the adverse action process. Those regulations state in part:

> If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. [emphasis supplied]

5 CFR 752.202(b).

In paragraphs two and three of the March 30, 1977, letter, Petitioner objected to his removal on the grounds, inter alia, that circumstances still existed which merited his being allowed an extension of his job in Germany. The Army's specific response contained in paragraph 2a. of Colonel O'Brien's April 18, 1977, memorandum to Mr. Harris, was that it had previously explained the "preliminary requirements which Mr. Harris had to meet before any further request(s) for delay in travel beyond the 30-day extension would be

considered, i.e., application to exercise his reemployment rights to return to CONUS by submitting to COP the completed requests for travel orders and signing any other required documents***." Put another way, the Army was saying in writing that it had not given consideration to paragraphs two and three of Petitioner's March 30, 1977, letter brief, as it was required to do by 5 CFR 752.202(b), quoted supra.

Despite this clear and compelling documentary evidence that the required consideration was not given, the Civil Service Commission examiner found in her decision that "appellant's written reply [of March 30, 1977] was fully considered as stated in the final decision by the Commander." That "final decision by the Commander," dated April 29, 1977, merely makes the bald assertion in paragraph two that the Commander had "fully and carefully review[ed] the reasons stated in Mr. Harris' written reply." In

view of the total contradiction of this statement with the written representation that no consideration had been given made by the same officer only eleven days previously, the Civil Service Commission examiner stood on a foundation of sand when she found on the basis of the "final decision by the Commander" that consideration had been given to the March 30 letter.

Further, the Civil Service Commission examiner held on page four of her decision that:

> The Commander testified that he fully considered appellant's written reply, but he was not convinced by the arguments therein or given reason to believe that appellant had complied or would comply with agency regulations requiring that he exercise his reemployment right to return to his former position in the continental United States (CONUS).

A search through Colonel O'Brien's testimony which is found at Tr. 59-74, discloses that there is no evidence whatsoever in that testimony to support the above-quoted finding of fact.

The Civil Service Commission examiner was required to view the evidence as a whole in finding facts on this point of compliance with the procedural regulations. Upon review, the Court of Claims affirmed the Civil Service Commission at Page 10 of its decision without discussion of the argument raised by Petitioner that Colonel O'Brien did not testify as to what the examiner found that he testified to, or of the clearly expressed assertion by Colonel O'Brien in his April 18, 1977, memorandum that he had not considered Mr. Harris' reasons stated in his March 30, 1977, letter of counsel in opposition to Petitioner's removal.

In view of the almost total lack of evidence supporting a finding that consideration was given to the March 30, 1977, answer of Petitioner in response to his proposed removal, and in view of the compelling nature of the statement in Colonel O'Brien's April 18 memorandum to the effect that consideration was in fact not given, Petitioner submits

that the Supreme Court should grant this Petition in order to consider whether the Court of Claims finding in this respect was in accordance with law.

In affirming the ill-founded Civil Service Commission holding on this point, the Court of Claims sanctioned a departure from the doctrine that a federal employee dismissal in violation of the procedural regulations therefor cannot stand--and Petitioner submits that this constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

2. The procedure adopted by the Department of the Army for rotating overseas-employed civilians back to the United States, as applied in this case, violated the Army's regulations at DACPR 352.8.

An agency of the federal government is bound by its own regulations in respect of the treatment of its employees, and employee dismissals undertaken in contravention of

regulations are illegal and are subject to reversal upon judicial review. See Service v. Dulles, 354 U.S. 363 (1957); Watson v. United States, 142 Ct.Cl. 749 (1958); See also Murray v. United States, 154 Ct.Cl. 185 (1961). In dismissing Mr. Harris, the Department of the Army committed several violations of its Civilian Personnel Regulations, as discussed below. It should be noted that in DACPR 272.2-2, the Army regulations state that "[t]hey are mandatory in application and will be used as the basic and controlling instructions in all subject areas covered." [emphasis supplied]

DACPR 352.8-6a states that: "The personal desires of the employee to remain in the overseas area must be given full consideration when authorizing an extension***." This language is mandatory. Further DACPR 352.8-6b provides that one of the bases for an extension is that "[s]pecial personal circumstances***make it inadvisable to require the employee or [sic] return."

Despite the clear mandate of these provisions, the administrative record herein makes it clear that Colonel O'Brien and Major Pettingill, the officers charged with the decision-making responsibility in this matter, did not in fact consider Mr. Harris' personal desires and special personal circumstances which Mr. Harris made clear to them at the February 1 meeting, Tr. 22, 71, on a frequent basis thereafter, Tr. 40-43, and in Mr. Hoernecke's letter of March 2, 1980. The most compelling evidence of this failure to consider as required by the Army regulations is contained in Colonel O'Brien's letter of March 21, 1977, which states that "[r]equests for approval of delayed travel because of an employees' personal reason may be considered once the employee has made application to exercise his reemployment rights and return to his former position in CONUS." The implication is clear that consideration had not in fact been given. Major Pettingill was unable,

although he was questioned at length on this matter, to firmly state that consideration had been given. Tr. 43, 49-51, 55, 58. Colonel O'Brien testified that he considered the "facts and circumstances" after the March 2 letter, but he immediately thereafter indicated in his testimony that in effect he did not truly consider the March 2 letter but relied on his past perceptions. Tr. 65. His March 21 letter supports the fact that he did not consider Mr. Harris' personal circumstances.

DACPR 352.8-8 gives the procedure for an employee to apply to exercise his reemployment rights. Subsection c thereof allows the employee to make formal application for such exercise within "30 calendar days after the completion date of the period for which such rights were granted." Further, the statute under which the regulations in issue were promulgated provides that an employee may apply "not later than thirty days after

his completion of such duty, for the right to return to a position in the United States***." 10 U.S.C. §1586. There is no dispute in the record that Mr. Harris' tour of duty did not expire until at least February 17, 1977. The method of application for an extension is specifically prescribed: the employee is to submit a letter, a Standard Form 171, and DD Forms 556 indicating satisfactory completion of tour. Neither of these forms has any relation to transportation and travel orders.

Despite this prescribed procedure, Colonel O'Brien, Major Pettingill, and Mr. Hanson, the civilian personnel officer in the Agency, explicity demanded of Mr. Harris that in order to gain consideration of his request for an extension, he would have to exercise his reemployment rights, which required that he formally request transportation and travel orders. There is apparently no authority for such a demand.

Mr. Harris justifiably was reluctant to

arrange for transportation and travel orders, as demanded by these Army officials, in light of the fact that his very purpose was to avoid having to abandon his wife in Germany in order to keep his job. In effect, the Army wished to put a gun at his head, and he was justified in resisting the idea, especially since such a demand is directly in conflict with the regulations on how an application for extension was to be filed. By issuing its travel order demand on Mr. Harris on February 24 by Major Pettingill's letter, the Army violated 10 U.S.C. §1586(b)(3) and DACPR 352.8-8(c), and rendered it futile for Mr. Harris to make the application as allowed by that statute and regulation within the thirty days following February 17, 1977.

DACPR 352.8 provides a choice for the employee who wishes to keep his job -- he may either apply for an extension or return to the United States. By its actions as described above, the Army deprived Mr. Harris

of this choice, thus violating the regulations and the intent of the statute.

3. The Army regulations governing the rotation program applicable to overseas-employed civilians, DACPR 352.8, as promulgated and applied herein, are beyond the authority granted in the enabling statute, 10 U.S.C. §1586.

In 10 U.S.C. §1586(b) the Congress provided authority for the Secretary of the Army to prescribe regulations with respect to civilian employees involved in the rotation program. These are the regulations at DACPR 352.8. As promulgated, these regulations go beyond the scope of the powers delegated to the Secretary under the statute, and to that extent are void. See Federal Maritime Commission v. Anglo-Canadian Shipping Company, 335 F2d 255, 258 (9th Cir. 1964).

The agency's regulations need not expressly violate the statute in issue -- it is enough that the regulations violate the intent

of the statute. In Guyer v. Cities Service Company, 381 F.Supp 7 (D.Wis. 1974) the Court said that it "is axiomatic that an administrative agency can only adopt regulations which comply with Congress' intent." 381 F.Supp. 11-12. In Guyer, supra, the Plaintiff service station owners argued that a Federal Energy Administration regulation should be read so as to prevent their supplier from terminating the station leases without prior FEA approval. The express wording of the regulation in issue was ambiguous, and subject to being read either way on the approval issue. The Court looked to the legislative history for the intent of the statute, and based its holding thereupon.

The legislative history of 10 U.S.C. §1586 states of the statute that:

> Its basic purpose is to authorize the Secretary of Defense and the Secretaries of the military departments to grant return rights to career and career-conditional civilian employees assigned to posts outside the United States. The return right would consist of a minimum guarantee to the employee

> that he will be placed, upon his return from overseas, in the same position he vacated to accept the foreign assignment. If his former post is no longer in existence, the employee will be placed in another position without reduction in seniority, status or tenure.

1960 U.S. Code Cong. and Ad. News p. 2670-71.

To be sure, the legislative history indicates that the Congress intended to establish the rotation program for the benefit of the Armed Services also, since the purpose of the rotation program was to overcome the resistance many civilian employees had to going overseas because of the risk it entailed in not finding a job upon return. However, it is clear that 10 U.S.C. §1586 is aimed first and foremost at providing protection for the federal employee. As Congressman Irwin stated during the consideration of the bill:

> ***the general effect of the legislation is to insure that employees who accept assignments to duty outside the United States will be restored at least to their status quo with respect to position, tenure, and salary, existing immediately prior to such assignment--to the maximum practicable extent consistent with the efficient operation of the departments concerned.

Report of Hearing before House Committee on Post Office and Civil Service, H.R. 10695 and H.R. 10829, 86th Congress, 2d Session, March 25, 1960, p. 3.

The Army acted in disharmony with the remedial intent of the Congress in enacting 10 U.S.C. §1586 in that the regulations it promulgated at DACPR 352.8 are written to serve primarily the Army's interests, providing it with unlimited power to return those individuals it chooses, but allowing it indefinitely to extend other employees whom it may choose. See DACPR 352.8-6b(1). DACPR 352.8-6 states that "the need of the oversea activity is the primary factor in arriving at a decision" on extension. This provision is not in harmony with the legislative intent of 10 U.S.C. §1586. Further, the application of the Army regulations in this instance, and the Army's actions here, as discussed above, were inconsistent with the remedial intent of 10 U.S.C. §1586.

4. The Court of Claims erred in holding that petitioner failed to comply with the Army's regulations regarding the procedure to exercise reemployment rights.

In its decision at Pages 7-8, the Court of Claims held that Mr. Harris had failed to exercise his reemployment rights in accordance with the procedure for such an exercise set out at DACPR 352.8-8, and that he was thus properly directed under DACPR 352.8-11 to return to the United States, and was consequently properly removed from the service pursuant to DACPR 352.7(c) upon his election not to comply with the Army's demands.

Petitioner does not dispute the fact that he did not undertake the formal procedure set out in DACPR 352.8-8 for exercise of his reemployment rights. However, as petitioner pointed out at Page 11 of his brief to the Court of Claims in support of his Motion for Summary Judgment, the Army made it crystal clear to Mr. Harris, beginning with Major

Pettingill's letter of February 24, 1977, that the only procedure -- unauthorized though it might be -- by which Mr. Harris could effectively apply to the particular officials involved for an extension was to subject himself to travel and transportation orders. Under the circumstances, it was made absolutely clear to Mr. Harris that undertaking the prescribed procedures during the thirty days following the end of his tour of duty, as extended, on February 17, 1977, would be futile and meaningless. Petitioner submits that the Court of Claims erred in holding him to the letter of the Army regulations for extension of duty, given the misleading nature of the express assertions by Army officials on this point.

5. The Army abused its discretion in removing Mr. Harris from the federal service under the circumstances of this case.

In Power v. United States, 209 Ct.Cl. 126, 531 F2d 505 (1976), the Court of Claims

held:

> ***courts disapprove discipline which is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency.

The record in this case discloses that the penalty imposed on Mr. Harris is so excessive under the circumstances as to constitute an abuse of discretion. The Army was aware of the difficulties Mr. Harris was facing in obtaining documents for his wife's visa application and was aware of the untenable position of family versus career in which it was putting him, yet the Army refused to grant him a relaeively minor extension of time by which he could resolve this dilemma. The Army would have suffered little prejudice in allowing Mr. Harris to remain at his job in Germany, even if it had involved an extension of more than the few short months that Mr. Harris was asking. As is noted above, Colonel O'Brien freely volunteered that Mr. Harris had done a fine job for the Army, one with which he had no argument. Yet, the Army took his

federal job because he chose not to abandon his wife.

D. CONCLUSION

This case presents significant questions of federal law involving the treatment by the military departments of great numbers of civilian employees stationed overseas. The Congress deemed the proper treatment of such employees of such vital importance to the defense effort of this country that it passed special remedial legislation in this field at 10 U.S.C. §1586. See the legislative history at 1960 U.S. Code Cong. and Ad. News, pp. 2670-73.

This case also presents questions of first impression with respect to the operation by the Army of the overseas civilian employee rotation program and the proper promulgation of the Army regulations under the enabling statute.

Finally, in respect of the individual, Jesse C. Harris, who has served his country

well for just under twenty years, this case presents important questions with respect to the sanctioning by the Court of Claims of such a departure from the accepted and usual course of administrative proceedings as to call for an exercise of this Court's power of supervision.

Mr. Harris respectfully requests that this Petition for Certiorari be granted for consideration of these matters.

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VIII. APPENDIX

Contents

Item 1: Opinion of United States Court of Claims, Jesse C. Harris v. The United States, No. 383-79C, decided January 28, 1981.

Item 2: Opinion of Hearing Examiner, United States Civil Service Commission, Federal Employee Appeals Authority, Appeal of Jesse C. Harris, Decision Number DC752B80356, decided September 6, 1978.

Item 3: Department of the Army Civilian Personnel Regulations (DACPR) 272.2 and 352.8.

Item 4: 10 U.S.C. §1586 (1976 ed.)

Item 5: February 24, 1977 letter from Major Pettingill to Mr. Harris.

Item 6: March 30, 1977 letter-response from Mr. Hoernecke to Major Pettingill

Item 7: April 18, 1977 memorandum from Colonel O'Brien.

APPENDIX

Item 1

In the United States Court of Claims

No. 383-79C

(Decided January 28, 1981)

JESSE C. HARRIS
v. THE UNITED STATES

W. Thomas Parrott, III, attorney of record for plaintiff Jesse C. Harris. *Johnson & Vickery*, of counsel.

Kathleen A. Flynn, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before FRIEDMAN, *Chief Judge*, SKELTON, *Senior Judge*, and KASHIWA, *Judge*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

SKELTON, *Senior Judge*, delivered the opinion of the court:

The plaintiff, Jesse C. Harris, was removed from his position as a civilian employee of the Department of the Army while working under an overseas assignment in Germany because he failed to exercise his reemployment rights to his former position in the United States in the time and manner required by law and as provided in his reemployment rights agreement that he executed before going to

Germany. He sues the defendant United States here for reinstatement, back pay and other benefits, alleging among other complaints that his removal was procedurally and constitutionally defective, and that it was arbitrary, capricious or malicious and an abuse of discretion, and that the penalty was too severe. The case is before us on cross-motions for summary judgment. We hold for the defendant.

The facts in the case are set forth fairly accurately in the brief of the defendant, which we adopt with some changes and additions, and which we supplement in the body of this opinion, as follows:

Plaintiff was employed as a communications specialist with the Department of the Army ("Army") at Fort Huachuca, Arizona, at the GS–393–12 level. On January 5, 1972, plaintiff executed a reemployment rights agreement ("agreement") as a result of which he accepted an overseas assignment, at the same grade and position, with the U. S. Army Communications-Electronics Engineering Installation Agency ("USACEEIA") in Europe. Plaintiff was stationed in West Germany.

The agreement provided, in pertinent part, as follows:

> I understand that this oversea assignment is part of the Army's rotation program and that my selection for this oversea tour of duty entitles me to reemployment rights to my former position upon completion of the initial tour of duty or upon completion of any approved extension thereof. I am aware that in the event an extension is not approved after completion of my initial tour of duty that I am expected to return to my former position in the United States.
>
> I also understand that reemployment rights are authorized for the initial tour and approved extensions thereto for an aggregate period of not to exceed 5 years. I understand that failure to make application for the exercise of these rights upon expiration of the 5-year period may result in action directing my return to my former position. In event of my failure to comply with such directed action I understand that my reemployment rights will expire and that I will be subject to separation from the service.

A chronology of the events which occurred subsequent to the execution of the agreement is necessary for a complete understanding of this case. The pertinent events are as follows. Plaintiff's initial overseas tour of duty was for 36 months. On April 30, 1975, plaintiff executed a supplement to

the agreement extending the period of reemployment rights for an additional 24 months not to exceed January 17, 1977. The supplement was subject to the same conditions as those specified in the original agreement.

On September 30, 1976, plaintiff married a Syrian National medical doctor. By letter dated December 1, 1976, plaintiff requested a 120-day delay in his scheduled January 17, 1977, return to the United States in order to obtain necessary immigration documents for his wife. In response to this request, Colonel George F. O'Brien, Commander, USACE-EIA, by letter dated December 6, 1976, advised plaintiff that a 30-day delay would be requested on plaintiff's behalf. Col. O'Brien further advised plaintiff therein that should plaintiff need additional time, as of February 1, 1977, the Army would entertain a request for it upon presentation by plaintiff of documents supporting plaintiff's efforts to obtain the visa in a timely manner.

As of February 24, 1977, plaintiff had not taken the necessary administrative steps to exercise his reemployment rights. Accordingly, by letter dated February 24, 1977, Major Albert R. Pettingill, in accordance with the agreement and supplement thereto, directed plaintiff to return to the United States and to make the necessary arrangements to exercise his reemployment rights by no later than March 7, 1977. Plaintiff was further advised therein that failure to make such arrangements within the designated time period would be construed as a refusal to accept assignment to his former position in the United States and that such action would result in a proposal to separate him from the federal service.

In response to the February 24, 1977, letter from Major Pettingill, plaintiff's counsel, in Germany, by letter dated March 2, 1977, requested an additional delay of 90 days citing the need to obtain necessary documentation for plaintiff's wife's visa. In view of plaintiff's subsequent failure to exercise his reemployment rights by March 7, 1977, the Army, by letter dated March 18, 1977, notified plaintiff of its proposal to remove him from his position.

On March 21, 1977, the Army responded to plaintiff's March 2, 1977, letter citing the proper procedure for requesting a delay in travel. Therein, plaintiff was advised that once he accomplished the procedures outlined in the February 24, 1977, letter, his request for a further delay in travel would be

considered provided he furnished justifiable reasons for the request. The plaintiff never furnished such reasons.

By letter dated April 29, 1977, Colonel O'Brien notified plaintiff of his decision to sustain the proposed removal action and advised plaintiff that the removal would be effective on May 13, 1977.

Plaintiff appealed the removal action to the United States Civil Service Commission ("Commission"). A hearing was held on December 13, 1977, before the Federal Employee Appeals Authority of the Commission ("FEAA"). On September 6, 1978, the FEAA sustained the removal action. It held that the Army had complied with all of the procedural requirements of the law as set forth in the applicable statute and Civil Service Regulations in removing plaintiff from his position, and that the Army's reason for his removal was supported by the evidence and should be sustained. The FEAA accordingly affirmed the action of the agency in removing the plaintiff from his position in the Federal Service. Plaintiff now seeks review of that adverse decision and seeks reinstatement to his former position, back pay with statutory increases, and restoration of benefits.

Generally, our authority in cases of this kind is limited to reviewing the administrative action to determine whether there has been substantial compliance with procedural requirements of applicable statutes and regulations, and whether the decision was arbitrary or capricious and supported by substantial evidence. *See Ogden* v. *United States*, 216 Ct. Cl. 490 (1978); *Power* v. *United States*, 209 Ct.Cl. 126, 531 F.2d 505 (1976); *Wathen* v. *United States*, 208 Ct.Cl. 342, 527 F.2d 1191 (1975).

The plaintiff contends that the Army did not comply with Department of the Army Civilian Personnel Regulation (DACPR) 352.8 (8–6)(a) and (b) in denying him a further extension to exercise his reemployment rights. He says that this Regulation requires the Army to give full consideration to the reasons plaintiff gave for his requested extension and that it failed to do so. He argues further that the special personal circumstances in his life, if considered, made the requested extension mandatory because of the provisions of the cited regulation. We do not agree. DACPR 352.8(8–6)(a) and (b) provide in pertinent part as follows:

(a) Extension for 5 years or less. It is the responsibility of the major oversea commander to make the determination that extension beyond the existing tour is in the best interest of the Department. Such determination should be made at least 6 months in advance of the completion date of the employee's existing tour. However, in the case of employees serving in a 12 months' tour of duty area who are not eligible for special placement assistance as discussed in paragraph 8–8b, determination may be postponed for an additional period of not to exceed 3 months. If an employee who has (or will have) satisfactorily completed his existing oversea tour elects to exercise his reemployment rights, his application must be honored even though the oversea activity may desire the employee to remain in the area for an additional tour. *Although the personal desires of the employee to remain in the oversea area must be given full consideration when authorizing an extension, the need of the oversea activity is the primary factor in arriving at a decision. However the needs of the former employing activity in the United States will be given full consideration in making the final determination.*

(b) Extension beyond 5 years. An employee serving in a foreign area . . . *will be required to exercise his reemployment rights within 5 years unless a further extension is granted.*

(1) Subject to the prior approval requirement set forth in paragraph 8–4 b, reemployment rights may be extended for an additional specified period of not more that 1, 2, or 3 years beyond the 5-year period when—

(a) A suitable replacement has not been located and time will be required to train a replacement;

(b) Special personal circumstances, such as imminent retirement, make it inadvisable to require the employee or [sic] return; or

(c) Special work circumstances make it desirable that the employee be retained for an additional specific period . . . (emphasis added).

There is nothing in this regulation that gave the plaintiff an absolute right to a further extension. The regulation is clearly for the benefit of the Army and not solely for the benefit of the serviceman as plaintiff contends.

The record shows that contrary to plaintiff's claims every consideration was given by the Army to plaintiff and to his reasons for wanting a further extension. Col. O'Brien and Major Pettingill so testified. The facts show that all correspondence between them and the plaintiff was considered by them along with the evidence of conversations with him. The

facts considered showed, among other things, that at first the plaintiff gave as a reason for wanting an extension beyond January 17, 1977, the end of his tour of duty, the fact that he was told by the United States consulate that he would need a police certificate of good character for his wife from both Syria and Russia, and also a medical educational certificate from Russia, in order for his wife to travel with him to the United States. Upon this representation, an extension of 30 days to February 17, 1977, was granted to him. Col. O'Brien advised the plaintiff that if he needed more time as of February 1, 1977, to obtain a visa for his wife, the Army would entertain a request for it upon plaintiff's submitting documents supporting his efforts to get the visa in a timely manner. The burden was on the plaintiff to submit proof of his efforts to get the visa and also evidence that the United States consulate or embassy had refused to grant a visa for his wife. He wholly failed to sustain this burden. It became apparent to the Army officials that the plaintiff was not having trouble getting a visa for his wife, but was having trouble getting the educational and good conduct certificates which would be necessary for her to practice medicine in the United States or to attend a graduate medical school in this country. In fact, the plaintiff stated in December, 1976, that he had secured all of the documentation necessary for his wife's visa, and that the only personal matters that he sought to have cleared up before returning to the United States was the obtaining of the necessary documentation relating to his wife's medical profession. Of course, the lack of these papers would not have prevented plaintiff's wife from going to the United States with him.

Finally, the facts show that as of February 24, 1977, the plaintiff had not submitted evidence as to his efforts to obtain a visa for his wife that would justify a further extension, and had not taken the necessary steps to exercise his reemployment rights. On that date Major Pettingill by letter directed the plaintiff in accordance with the agreement to return to the United States and to make the necessary arrangements to exercise his reemployment rights and obtain travel orders by no later than March 7, 1977. He was further advised that his failure to do so would be construed as a refusal to accept his former position in the United States and that such inaction would result in a proposal to separate him

from the service. The plaintiff did nothing to comply with this directive. He had counsel write Major Pettingill a letter dated March 2, 1977, requesting more time to get a visa for his wife. This request was refused by Col. O'Brien by letter of March 21, 1977, in which plaintiff was told that if he applied to exercise his reemployment rights and obtained his travel orders "your request for further delayed travel will be considered, provided you furnish the justifiable reasons for the request." Thus, it appears that the Army was making every effort to cooperate with the plaintiff. On the other hand, the plaintiff did nothing but ask for another extension.

The Regulations show the proper way to exercise reemployment rights. DACPR 352.8(8–8)(a) and (c) provide:

> 8–8 EXERCISE OF REEMPLOYMENT RIGHTS
>
> Basic requirements. Exercise of reemployment rights is contingent upon the filing of a timely application and satisfactory completion of the initial oversea tour and any approved extension thereof.
>
> • • • • •
>
> c. Application. Formal application to exercise reemployment rights must be submitted by the employee not later than 30 calendar days after the completion date of the period for which such rights were granted. If, however, the employee departs the oversea command immediately upon completion of the prescribed tour, he has 30 calendar days after the date he reenters the United States in which to make formal application to exercise reemployment rights.
>
> (1) Application for exercise of reemployment rights will be made by submission of a letter, accompanied by a completed Personal Qualifications Statement (Standard Form 171) and DD Forms 556 executed in accordance with CPR S1.1 and indicating that the employee has (or will have) satisfactorily completed the prescribed oversea tour (d below), through the headquarters of the appropriate oversea command to the former employing activity in the United States.

It is undisputed that the plaintiff never filed the application to exercise his reemployment rights as required by the above Regulations.

The Regulations are equally clear on the procedure to be followed by the Army in case a civilian employee fails to timely file such an application after his tour of duty has expired. Paragraph 352.8(8–7)(c) provides:

c. Expiration of rights. In all instances where reemployment rights will not be extended (para 8–6), the oversea appointing officer will provide the employee with advance written notification of the date by which he must file application to exercise his existing rights. In addition to other pertinent information, this notice will contain advice indicating that *failure to make timely application to exercise reemployment rights will result in the employee being directed to return to his former position in the United States (para 8–11) and that refusal to comply will result in his being separated from the service.* (Emphasis supplied).

Paragraph 8–11 of such Regulations states:

8–11. DIRECTED RETURN TO UNITED STATES

When, following receipt of notice of expiration of reemployment rights (para 8–7c), an employee serving in a foreign area (para 8–1c)(1)) fails or refuses to make application to exercise those rights, the oversea employing activity will initiate action to direct the individual's return to the United States.

It is clear that the plaintiff wholly failed to comply with these Regulations, and that, on the other hand, the officials followed the proper course in ordering plaintiff to return to the United States or be separated from the service. When the plaintiff failed to file the necessary application and refused to return to the United States, the Army properly removed him from the service.

The FEAA found the foregoing facts to be true, and held that the agency complied with all of the procedural requirements of the law and Civil Service regulations in removing plaintiff from the service. It held further that the agency made reasonable efforts to accommodate the plaintiff and was not abusive in exercising its discretion and was not arbitrary, capricious or unreasonable in removing him from his position. It concluded further that plaintiff's removal was justified, was supported by substantial evidence, and that the penalty was appropriate. The removal action was affirmed.

We conclude from our review of the decision of the FEAA that it is supported by substantial evidence, is not arbitrary or capricious, and compiies with the applicable laws and regulations and should be affirmed.

The plaintiff contends further that the Army travel requirement violated 10 U.S.C. §1586(b)(3), which provides in pertinent part:

(b) Notwithstanding any other provision of law, the Secretary of Defense with respect to civilian employees of the Department of Defense other than employees of a military department, and the Secretary of each military department with respect to civilian employees of such military department, may, under such regulations as each such Secretary may prescribe with respect to the employees concerned and in accordance with the policy and other provisions of this section, establish and operate programs of rotation which provide for the granting of the right to return to a position in the United States to each civilian employee in the department concerned-

(1) who, while serving under a career-conditional or career appointment in the competitive civil service is assigned at the request of the department concerned to duty outside the United States,

(2) who satisfactorily completes such duty, and

(3) who applies, not later than thirty days after his completion of such duty, for the right to return to a position in the United States as provided by subsection (c) of this section . . . .

The argument of plaintiff is without merit. The statute authorizes the Secretary of Defense and the various military departments to promulgate regulations providing for the rotation of civilian employees serving overseas so that they may return to positions in the United States after completing their tours of duty abroad. The Army's regulations (DACPR352.8) were written pursuant to and in accordance with this statutory authority. The plaintiff also complains that DACPR352.8 is ambiguous and that it is outside the scope and intent of the statute and conflicts with it and is invalid. We do not agree. We hold that the regulation is consistent with the language and intent of the statute and is a valid guideline for the rotation of overseas civilian employees from their posts abroad to positions in the United States.

The plaintiff contends, also, that he was denied the right to respond to the proposal to remove him pursuant to 5 C.F.R. .752.202 (b) which provides:

(b) *Employee's answer.* Except as provided in paragraph (c) of this section, an employee is entitled to a reasonable time for answering a notice of proposed adverse action and for furnishing affidavits in support of his answer. The time to be allowed depends on the facts and circumstances of the case, and shall be sufficient to afford the employee ample opportunity to review the material relied on by the agency

> to support the reasons in the notice and to prepare an answer and secure affidavits. The agency shall provide the employee a reasonable amount of official time for these purposes if he is otherwise in an active duty status. If the employee answers, the agency shall consider his answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both personally and in writing. The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representations which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses. When the employee requests an opportunity to answer personally, the agency shall make a representative or representatives available to hear his answer. The representative or representatives designated to hear the answer shall be persons who have authority either to make a final decision on the proposed adverse action or to recommend what final decision should be made.

This argument is also without merit. The record shows and the FEAA found that the reasons for plaintiff's removal were set forth with sufficient specificity and detail to enable plaintiff to reply to them and that he did in fact so reply in writing. His reply was fully considered by the Army. It is clear that the plaintiff exercised his rights pursuant to 5 C.F.R. 752 at every step of the proceeding.

Next, the plaintiff claims that he should prevail because of the doctrine of estoppel. This issue was not raised before the FEAA and cannot be raised here for the first time. *See Pine v. United States*, 170 Ct.Cl. 146, 371 F.2d 466 (1967); and *Grover v. United States*, 200 Ct.Cl. 337 (1973). Furthermore, the claim is without merit because the necessary elements of estoppel against the United States have not been proven.

The plaintiff also says that the penalty of removal imposed upon him is too severe. The FEAA held that his removal was an action such as to promote the efficiency of the service and was not arbitrary, capricious or unreasonable. We agree. It is well established that whether to remove an employee is a matter to be decided by the agency, and that such agency has the discretion to determine what penalty to be imposed on an employee for violating the rules. Furthermore, a court will not substitute its judgments for that of an agency with respect to the severity of an imposed penalty. *See Wathen* v. *United States*, 208 Ct.Cl. 342, 527 F.2d 1191 (1975); *Kandall* v.

United States, 186 Ct.Cl. 900, *cert. denied*, 396 U.S. 837 (1969); *Keim* v. *United States*, 177 U.S. 290 (1900); *Birnholz* v. *United States*, 199 Ct.Cl. 532 (1972); *Cook* v. *United States*, 164 Ct.Cl. 428 (1964); *Lawyer* v. *United States*, 147 Ct.Cl. 501 (1959), *cert. denied*, 362 U.S. 977 (1960); *Liotta* v. *United States*, 174 Ct.Cl. 91 (1966).

Finally, the plaintiff asserts that he was deprived of his property rights in his job by the Army without due process of law. The plaintiff cannot prevail on this issue because the regulations cited above provide that an agency cannot take an adverse action against an employee except for such cause as will promote the efficiency of the service. 7 C.F.R. §752.104(a). Also, they specify that the employee be given a 30-day notice of a proposed adverse action, including the reasons therefor, a reasonable time to answer, a copy of the agency's decision as soon as possible, and a right to appeal to the Civil Service Commission (7 C.F.R. 752.202 through 752.203). This procedure was upheld by the Supreme Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1973). In that case the plurality of the Court held that where the statute and regulations provided that an employee could not be separated except for such cause as would promote the efficiency of the service they "did not create an expectancy of job retention in those employees requiring procedural protection under the Due Process Clause beyond that afforded here by the statute and related agency regulations." 416 U.S. at 163. In the instant case, the plaintiff was accordingly afforded all of the due process required by the statute and the regulations, and, consequently, he has not been deprived of property rights in violation of the Constitution. He was given the benefits of an overseas tour of duty in the first place by reason of the statute and the regulations, and he will not now be heard to complain that the same statute and regulations were invalid and unconstitutional and deprived him of his job property rights in violation of the Constitution when he was separated from the service by reason of his violation of their provisions. This is especially true since he was given all the procedural protection "afforded by the statute and related agency regulations" under which he obtained his overseas assignment.

In *Arnett* v. *Kennedy*, *supra*, the plurality opinion also stated:

The Court has previously viewed skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits. In Fahey v. Mallonee, 332 US 245, 91 L Ed 2030, 67 S Ct 1552 (1947); it was observed:

* * * * *

"It is an elementary rule of constitutional law that one may not 'retain the benefits of an Act while attacking the constitutionality of one of its important conditions.' United States v. San Francisco, 310 US 16, 29 [84 L Ed 1050, 60 S Ct 749]. As formulated by Mr. Justice Brandeis, concurring in Ashwander v. Tennessee Valley Authority, 297 US 288, 348 [80 L Ed 688, 56 S Ct 466], 'The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.'" Id., at 255, 91 L Ed 2030.

This doctrine has unquestionably been applied unevenly in the past, and observed as often as not in the breach. We believe that at the very least it gives added weight to our conclusion that where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet.

416 U.S. at 152–154.

The above quoted portion of the court in that case is squarely in point in the case before us.

We hold that the decision of the FEAA affirming the separation of the plaintiff from the service by the Army was not arbitrary, capricious or erroneous as a matter of law, and that it was supported by substantial evidence and that it should be, and it is hereby, approved and affirmed.

The motion for summary judgment of the defendant is granted and that of the plaintiff is denied, and plaintiff's petition is dismissed.

☆ U.S. Government Printing Office: 311-087/17

APPENDIX

Item 2

Decision of Civil Service Commission, Federal Employee Appeals Authority, Appeal of Jesse C. Harris, Decision Number DC752B80356, decided September 6, 1978:

INTRODUCTION

By letter dated May 20, 1977, Jesse C. Harris, through his attorney, Lutz B. Hoernecke, appealed the action of the Department of the Army, U.S. Army Communications - Electronics Engineering Installation Agency (USACEEIA), Europe, removing him from his position of Communications Specialist, GS-393-12, Step 7, at $24,528 per annum, effective May 13, 1977.

BASIS FOR ACCEPTANCE

Appellant was an employee of the competitive service who had completed a probationary period. We find that he was entitled to appeal to the Federal Employee Appeals Authority under section 752.203 of the Civil Ser-

vice regulations and that his appeal was timely filed.

ANALYSIS AND FINDINGS

A. Procedures

Section 752.202 of the Civil Service regulations provides that an employee against whom adverse action is sought is entitled to a minimum of 30 days' advance written notice setting forth, specifically and in detail, the reasons for the proposed action. The agency must inform the employee of the right to review the material relied on in proposing the action and of the right to reply personally and in writing to the proposed action. The employee is entitled to a reasonable time in which to exercise the right of reply. Any response by the employee must be considered by the agency in reaching its final decision. The decision itself, must be made by an official at a higher organizational level than the official who proposed the action and must identify the reasons in the proposal notice that have been found sustained.

By letter dated March 18, 1977, appellant received advance notice thatthe agency proposed to remove him from his position for the following reasons:

1. References:

a. DA Civilian Personnel Regulation (CPR) 352.8, Reemployment Rights.

b. Federal Personnel Manual (FPM) Supplement 752-1, S1-3.

c. Reemployment Rights Agreement - Mr. Jesse C. Harris, signed 5 January 1972.

d. Supplement to Reemployment Rights Agreement - Mr. Jesse C. Harris, signed 30 April 1975.

e. Letter, CCCE-AF, this agency, 24 February 1977, subject: Directed Return to Position in the United States.

2. This is to inform you that I am proposing to remove you from your position of Communications Specialist, GS-393-12, Job Nr. W-1802, AAF Division, USACEEIA-EUR, APO 09056,

not earlier than 30 calendar days from the date you receive this notice, for failure to accept the assignment to your former position in CONUS under your reemployment rights agreement (ref 1c and 1d, above), which would carry out the terms of the Department of the Army's rotation program.

3. The facts supporting the basis for proposing your removal from Federal Service are as follows:

a. On 5 January 1972, upon leaving your former position of Communications Specialist, GS-393-12, with the Project Management Office, Ft. Huachuca, Arizona, to accept an overseas assignment, you signed a Reemployment Rights Agreement (ref 1c, above) as part of the Department of the Army's rotation program which entitled you to reemployment rights to that position upon completion of your initial tour of duty overseas or any approved extensions thereof, up to an aggregate period not to exceed five years.

That agreement between yourself and the Department of the Army stated that you understood that failure to make application to exercise those rights upon expiration of the five year period may result in action directing your return to your former position. It further stated that you understood that, if you failed to comply with such directed action, your reemployment rights would expire and that you would be subject to separation from Federal Service.

b. Reference 1d, above, modified your original agreement (ref 1c) to reflect the 24-month extension of your reemployment rights beyond your initial thirty-six months overseas tour to 17 January 1977. That supplemental agreement, which you signed on 30 April 1974, documented that you understood that your exercise of reemployment rights upon completion of that additional overseas tour period was subject to the conditions

specified in the original agreement (ref 1c).

c. Following expiration of your five-year overseas tour and reemployment rights of 17 January 1977, you were authorized a 30 day delay in travel for personal reasons through 17 February 1977 by Ft. Huachuca. On 1 February 1977 you stated orally to Colonel O'Brien and Mr. Hanson that you were not going to return and exercise your reemployment rights to your former position in CONUS. As of 17 February 1977, you had not made the necessary arrangements to exercise your reemployment rights and return to your former position of Ft. Huachuca. In accordance with reference 1a above, you were therefore directed by reference 1e to exercise your reemployment rights and return to your former position in CONUS. Paragraph 3 of that letter directed you to report to the Mannheim Area CPO to make the necessary travel arrangements

to exercise your reemployment rights to Ft. Huachuca by 7 March 1966. Paragraph 4 advised you that failure to do so would be construed as a refusal to accept assignment to your former position in CONUS, which would carry out the terms of DA's rotation program, and that such action on your part would result in a proposal to separate you from Federal Service.

d. As of the date of this letter, you failed to comply with the requirements stated in the above directive. Such action on your part constitutes a refusal to accept assignment to your former position in CONUS under the terms of your reemployment rights agreement with the Department of the Army as part of its rotation plan. Your failure to accept that assignment is not in the best interests of the service and will not be condoned. This proposed action to remove you from Federal Service is considered necessary to promote the

efficiency of the Service and is in accordance with DA and Civil Service Commission regulatory procedures (ref 1a and 1b, respectively).

We find that the reason was set forth with sufficient specificity and detail to permit an opportunity for reply.

Appellant was given (15) calendar days from the receipt of the notice of the proposal to make a reply in person, in writing, or both and to present witnesses and affidavits in support of his answer. He was informed that the material relied upon to support the adverse action was available for review in the Mannheim Area Civilian Personnel Office, Mannheim, Germany. Appellant submitted a written reply dated March 30, 1977, but made no oral presentation.

The agency notified appellant of the decision to remove him by letter dated April 29, 1977, signed by the Commander, an official of a higher organizational level than the official who proposed the action. The

agency found that the reason set forth in the proposal notice was fully supported by the evidence and warranted appellant's removal from the service. The effective date of appellant's removal was identified as May 13, 1977. Appellant was retained in an active duty status throughout the notice period.

Appellant contends that he was denied a fair opportunity to reply because his March 30, 1977, written reply was not give serious consideration by the Commander and because nothing short of a personal plea would have persuaded the Commander to render a final decision in favor of appellant. By letter dated April 18, 1977, the Commander responded to appellant's written reply in advance of the final decision of April 29, 1977. The Commander testified that he fully considered appellant's written reply, but he was not convinced by the arguments therein or given reasons to believe that appellant had complied or would comply with agency regulations requiring that he exercise his reemployment

right to return to his former position in the continental United States (CONUS). We find that appellant's written reply was fully considered as stated in the final decision by the Commander. Appellant was advised of his right to make a personal presentation to the Commander (with the assistance of his representative) in the proposal notice; he didnot do so, thereby waiving his opportunity to convince the Commander personally. Accordingly, we further find that appellant was not deprived of an opportunity to persuade the deciding official personally.

We find that the agency complied with all of the procedural requirements of the law and Civil Service regulations in effecting appellant's removal.

B. Merits

Except for the agency's account of apellants' February 1, 1977, oral statement that he refused to return to the continental United States (CONUS) on rotation, appellant does not deny either the accuracy of the background

information supplied in the advance notice or that he failed to exercise his reemployment rights to return to his former position in CONUS. We find, therefore, that the agency's reason for the removal is supported by the evidence and it is sustained.

C. Severity of the Penalty

Appellant's arguments are essectially directed at the question of whether the penalty of removal was appropriate. His contentions in this respect are five-fold:

1) That the agency failed to give adequate consideration to the hardship which would result from his return to CONUS at that time;

2) That he was not accorded priority placement assistance securing a GS-13 level position upon his return to CONUS;

3) That the agency breached its contractual agreement with appellant in that it did not exercise the discretion to delay appellant's return to CONUS to which he was entitled under terms of the reemployment

agreement;

4) That the DOD requirement that civilian employees return to CONUS at the completion of five years foreign service is an unconstitutional restriction on an employee's right to choose his place of residence; and

5) That Department of Defense (DOD) regulations requiring rotation of civilian employees to CONUS after five years of foreign service are not within the intent of PL 86-585.

1) Appellant bases his claim of hardship on his alleged inability to secure the necessary documents which permit his wife to accompany his return to CONUS. Appellant married a Syrian national on September 30, 1976, who had lived 7 years in Russia where she earned a Doctor of Medicine degree. However, it appears that she cannot be authorized to practice medicine in the United States without passing the American Medical Association examination for foreign medical graduates. Appellant testified that she does not possess

sufficient fluency in English to pass the examination currently or sufficient command of the German language to secure employment in that country in the event that she did not accompany him to the United States. In addition, he did not wish to support two households. Appellant applied for an immigration visa for his wife on or about October 6, 1976, but police certification from her previous countries of residence (Syria and Russia) was required by the State Department for issuance of a visa. He was also desirous of obtaining certification of her medical education which would enable her to acquire status as a graduage medical student when she arrived in the United States. He strenuously asserts that it was unreasonable of the agency to require that he exercise his reemployment rights before he had secured these documents.

The record reflects that by letter dated December 6, 1976, the Commander acquiesed in a 30-day delay of the rotation date from January 17, 1977, to February 17, 1977, to

accommodate appellan'ts need to secure a visa fc his wife. The Commander's December 6, 1976, letter, further advised appellant that an additional delay in travel time would be considered if requested before February 1, 1978, "upon presentation by you of documents that will support your efforts to obtain the visa in a timely manner." The record also reflects that appellant's supervisor discussed the situation with him numerous times and urged him to contact the Commander without delay if he needed more time. The Commander and his deputy testified that appellant told them that procuring his wife's visa was not longer a problem on February 1, 1977. Appellant did not deny this testimony and he conceded that the medical education certificate was not required for an immigration visa, but reiterated that hardship would result to his family if he was forced to rotate before he acquired the educational documents from Russia. He admitted, however, that he had not contacted the U.S. Embassy in an effort

to obtain the documents as the Commander had suggested.

By letter dated February 24, 1978, appellant's supervisor explicitly advised him that he must indicate his intent to return to CONUS by exercising his reemployment rights and executing a request for transportation and port of call no later than March 7, 1978; that his failure to do so would be interpreted as a refusal to accept the transfer; and that a proposal to separate him from the Federal service would be the result. We note here that this advice was not issued until 7 days subsequent to the amended February 17, 1977, date for rotation. The supervisor testified that since appellant had not indicated his intent to accept transfer as directed, he issued the proposal notice on March 18, 1976.

Appellant did request further delay by letter to the Commander dated March 2, 1978, which was received on March 8, 1978. By letter dated March 21, the Commander again advised appellant that his request for a

further delay would be considered if he exercised his reemployment rights. Appellant at no time exercised his reemployment rights or executed the necessary transportation documents.

The first question is whether the immigration of appellant's wife to the United States without having secured the medical education documents constituted a "hardship" of such nature that the agency was obliged, under its regulations, to delay appellant's rotation. That an employee is faced with unpleasant alternatives as a result of agency action is not necessarily an indicia of arbitrariness on the part of the agency. We draw a distinction between appellan'ts necessity to obtain a visa for his wife in order that she might accompany him and his desire to enhance her employment opportunities in the United States, as did the agency. Both the Commander and appellant's supervisor testified that once appellant had complied with the administrative needs of the agency

to provide tangible evidence of his intent, another request for delay would have been favorably considered. In light of the above, we find that any hardship to appellant was the result of his refusal to comply with agency requirements rather than arbitrary action by the agency.

2) Appellant's claim of entitlement to DOD Priority Placement Program (PPP) procedures rests on his temporary promotion to a GS-13 position for 6 months in 1973. Such assistance is only provided to employees who occupy higher grade positions at the termination of their five year rotational assignment than the positions which they left and to which they have reemployment rights in CONUS. It is evident that appellant's temporary promotion in 1973 did not entitle him to PPP benefits and we so find.

3) Appellant bases his argument that the agency breached its 1972 contractual agreement and the 1975 amendment thereto on the wording of the contract stating that the

agency "may" take action requesting or requiring employees to return to CONUS. He contends that the word "may" requires the agency to exercise reasonable discretion rather than "blind" compliance with the regulation, which it has not done. While we agree with appellant that word "may" permits agency discretion, we have found above that the agency exercised that discretion in a reasonable manner to waive the contractional return date of January 17, 1977, substituting a later date to accommodate appellant. Moreover, we note that the 1972 agreement clearly stated that appellant would be subject to separation from the service for failure to comply and that the agency extended the original three year overseas assignment until February 17, 1977, at appellant's request. Accordingly, we find no abuse of agency discretion in this respect and no breach of its agreement with appellant.

4) Appellant asserts that the agency has deprived him of his constitutional right to choose his place of residence and that the agency did not address this argument as set forth in his written reply. His argument that Public Law (PL) 86-585 (10 U.S.C. §1586) is unconstitutional was again raised in his letter of appeal and at the hearing. We find, first, that the Commander addressed this argument in paragraph 2d of his April 18, 1977, response to appellant's written reply. Secondly, based on our review of the cases cited by appellant, we find that they are distinguished from the case before us in that appellant, freely and with full knowledge and understanding, agreed to relocation by the agency under certain conditions in order to obtain an assignment in Europe. (TR 10, 15-17) Thirdly, the test of constitutionality in this line of cases is the balancing of governmental interest against the public employee's rights to choose his place of residence. PL 86-585, the statutory

authorization for the DOD rotational regulations, states in pertinent part that it is "the policy of the Congress to facilitate the interchange of civilian employees of the Defense Establishment between posts of duty outside the United States through the establishment and operation of programs for rotation, to the extent consistent with the missions of the Defense Establishment and sound principles of administration, of such employees who are assigned to duty outside the United States." PL 86-585 grants each Secretary of Defense the authority and responsibility for implementation of such system of rotation. Thus, the neabling statute itself provides a clear expression of of a persuading governmental interest in the rotation of DOD civilian personnel. Based on the above, while we make no finding on the constitutionality of PL 86-585, we find no grounds upon which we can conclude that appellant has been deprived of a constitutional right by reason of the action

appealed.

5) Finally, whether the agency regulation is abusive of the legislative intent of PL 86-585 is a matter which is not within our appellate purview. Notwithstanding, we note that the deciding official was bound to comply with agency regulations, not having authority to do otherwise.

Since the agency made reasonable efforts to accommodate appellant and was not abusive in exercising its discretion, we find that the action removing appellant from his position was justified.

CONCLUSION

Having sustained the agency's reason for the action and having found that the penalty was appropriate, we conclude that the removal action was such as to promote the efficiency of the service and was not arbitrary, capricious or unreasonable.

DECISION

The Washington, D.C., Field Office of the Federal Employee Appeals Authority hereby

affirms the action of the agency removing appellant from his position in the Federal service.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative remedies which must preced resort to the courts. However, section 772.310 of the Civil Service regulations permits the Commission's Appeals Review Board, in its discretion, and not withstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a

misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument which he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to;

Chairman
Appeals Review Board
U.S. Civil Service Commission
Washington, D.C. 20415

For the Commission:

Martha W. Rousos
Assistant Appeals Officer

Thomas J. Lanphear
Chief Appeals Officer

APPENDIX

Item 3

Department of the Army Civilian Personnel Regulations (DACPR) 272.2 and 352.8 (set out in material part):

Subchapter 2. Civilian Personnel Issuances

2-1 GENERAL CHARACTER

* * * * * * *

2-2 COMPENENT PARTS OF THE ISSUANCE SYSTEM

* * *

a. Civilian Personnel Regulations (CPR). Civilian personnel regulations contain official instructions governing civilian personnel administration throughout the Department of the Army. Civilian personnel regulations contain the Department's administrative provisions supplementing material in the various publications comprising the Federal Personnel Manual issuance system, and incorporate pertinent requirements of law, of Department of Defense directives, and of regulations issued by outside control agencies (such as the

General Accounting Office, Office of Management and Budget, and the Department of Labor). They are mandatory in application and will be used as the basic and controlling instructions in all subject areas covered.

* * * * * * *

Subchapter 8. Oversea Reemployment Rights

8-1 GENERAL

a. Coverage. This subchapter sets forth the reemployment rights granted Department of the Army employees accepting reassignment from positions within the United States to positions in oversea areas. Additionally, this subchapter covers return to civilian employment within the United States following completion of the oversea assignment.

* * * * * * *

8-6 EXTENSION OF REEMPLOYMENT RIGHTS

a. Extension for 5 years or less. It is the responsibility of the major oversea commander to make the determination that extension beyond the existing tour is in the best interest of the Department. Such deter-

mination should be made at least 6 months in advanceof the completion date of the employee's existing tour. However, in the case of employees serving in a 12 months' tour of duty area who are not eligible for special placement assistance as discussed in paragraph 8-8b, determination may be postponed for an additional period of not to exceed 3 months. If an employee who has (or will have) satisfactorily completed his existing oversea tour elects to exercise his reemployment rights, his application must be honored even though theoversea activity may desire the employee to remain in the area for an additional tour. Although the personal desires of the employee to remain in the oversea area must be give full consideration when authorizing an extension, the need of the oversea activity is the primary factor in arriving at a decision. However, the needs of the former employing activity in the United States will be given full consideration in making the final determination.

b. Extension beyond 5 years. An employee serving in a foreign area (para 8-1c(1)) will be required to exercise his reemployment rights within 5 years unless a further extension is granted.

(1) Subject to the prior approval requirement set forth in paragraph 8-4b, reemployment rights may be extended for an additional specified period of not more than 1, 2, or 3 years beyond the 5-year period when--

(a) A suitable replacement has not been located and time will be required to train a replacement;

(b) Special personal circumstances, such as imminent retirement, make in inadvisable to require the employee or return; or

(c) Special work circumstances make it desirable that the meployee be retained for an additional specific period.

(2) When reemployment rights are extended for a period which will not permit completion of the tour of duty prescribed for the area, reemployment leave travel may not

be permitted between completion of the existing tour of duty and the beginning of the period for which extension is approved.

8-7 REEMPLOYMENT RIGHTS NOTIFICATION REQUIREMENTS

a. Written agreement. The relasing activity in the United States will prepare a reemployment rights agreement in the format shown in appendix C and obtain the employee's signature on the original and one copy thereof. The original will be incorporated in the employee's official personnel folder, and the duplicate will be given to the employee.

b. Extension of rights. (1) Notice of approval of extension of reemployment rights under paragraph 8-6 will be submitted through oversea and CONUS command channels to the former employing activity at least 8 months in advance of the expiration date of the employee's existing rights. Each notice will contain information as to whether the employee intends to perform reemployment leave travel

between tours, and the approximate date the employee may be expected to return to his former employing activity in the United States.

(2) Notification of each extension approved by the major oversea command under paragraph 8-6b setting forth the justification therefore, the name of the former employing activity to which reemployment rights attach, and the period for which such rights were extended will be forwarded to the Deputy Chief of Staff for Personnel, Department of the Army, Washington, DC 20310.

c. Expiration of rights. In all instances where reemployment rights will not be extended (para 8-6), the oversea appointing officer will provide the employee with advance written notification of the date by which he must file application to exercise his existing rights. In addition to other pertinent information, this notice will contain advice indicating that failure to make timely application to exercise reemployment rights will result in the employee being directed to

return to his former position in the United States (para 8-11) and that refusal to comply will result in his being separated from the service.

d. Failure to exercise rights. Whenever reemployment rights will not be exercised because of placement under the return placement assistance program (para 8-8b), return from theoversea post for separation, or other action, the oversea commend will provide timely notification to that effec to the former employing activity in the United States.

8-8 EXERCISE OF REEMPLOYMENT RIGHTS

a. Basic requirements. Exercise of reemployment rights is contingent upon the filing of a timely application and satisfactory completion of the initial oversea tour and any approved extension thereof.

b. * * *.

c. Application. Formal application to exercise reemployment rights must be submitted by the employee not later than 80 calendar

days after the completion date of the period for which such rights were granted. If, however, the employee departs the oversea command immediately upon completion of the prescribed tour, he has 30 calendar days after the date he reenters the United States in which to make formal application to exercise reemployment rights.

(1) Application for exercise of reemployment rights will be made by submission of a letter, accompanied by a completed Personal Qualifications Statement (Standard Form 171) and DD Forms 556 executed in accordance with CPR S1.1 and indicating that the employee has (or will have) satisfactorily completed the prescribed oversea tour (d below), through the headquarters of the appropriate oversea command to the former employing activity in the United States.

* * * * * * *

8-11 DIRECTED RETURN TO UNITED STATES

When, following receipt of notices of

expiration of reemployment rights (para 8-7c), an employee serving in a foreign area (para 8-1c(1)) fails or refuses to make application to exercise those rights, the oversea employing activity will initiate action to direct the individual's return to the United States.

28 U.S.C.
§1586. Rotation of career-conditional and career employees assigned to duty outside the United States.

(a) In order to advance the programs and activities of the Defense Establishment, it is hereby declared to be the policy of the Congress to facilitate the interchange of civilian employees of the Defense Establishment between posts of duty in the United States andposts of duty outside the United States through the establishment and operation of programs for the rotation, to the extent consistent with the missions of the Defense Establishment and sound principles of administration, of such employees who are assigned to duty outside the United States.

(b) Notwithstanding any other provision of law, the Secretary of Defense with respect to civilian employees of the Department of Defense other than employees of a military

department, and the Secretary of each military department, may, under such regulations as each such Secretary may prescribe with respect to the employees concerned and in accordance with the policy and other provisions of this section, establish and operate programs of rotation which provide for the granting of the right to return to a position in the United States to each civilian employee in the department concerned--

(1) who, while serving under a career-conditional or career appointment in the competitive civil service, is assigned at the request of the department concerned to duty outside the United States,

(2) who satisfactorily completes such duty, and

(3) who applies, not later than thirty days after his completion of such duty, for the right to return to a position in the United States as provided by subsection (c) of this section.

The Secretary of the department concerned may provide by regulation for the waiver of the provisions of paragraphs (2) and (3) of this subsection, or of either of such paragraphs, or either of them, would be against equity and good conscience or against the public interest.

(c) The right to return to a position in the United States granted under this section shall be without reduction in the seniority, status, and tenure held by the employee immediately before his assignment to duty outside the United States and the employee shall be placed, not later than thirty days after the date on which he is determined to be immediately available to exercise such right, in accordance with the following provisions:

(1) The employee shall be placed in the position which he held immediately before his assignment to duty outside the United States, if such position exists.

(2) If such position does not exist, or with his consent, the meployee shall be placed in a vacant existing position, or in a new continuing position, for which he is qualified, available for the purposes of this section in the department concerned, in the same geographical area as, with rights and benefits equal to the rights and benefits of, and in a grade equal to the grade of, the position which he held immediately before his assignment to duty outside the United States.

(3) If the positions described in paragraph (1) and paragraph (2) of this subsection do not exist, the employee shall be placed in an additional position which shall be established by the department concerned for a period not in excess of ninety days in order to carry out the purposes of this section. Such additional position shall be in the same geographical area as, with rights and benefits not less than the rights and benefits of, and in a grade not lower than the grade of, the position held by the

employee immediately before his assignment to duty outside the United States.

(4) If, within ninety days after his placement in a position under paragraph (3) of this subsection, a vacant existing position or new continuing position, for which the employee is qualified, is available for the purposes of this section in the departmetn concerned, in the same geographical area as, with rights and benefits equal to the rights and benefits of, and in a grade equal to the grade of, the position which he held immediately before his assignment to duty outside the United States, the employee shall be placed in such vacant existing position or new continuing position.

(5) If, within the ninety-day period referred to in paragraphs (3) and (4) of this subsection, the employee cannot be placed in a position under such paragraph (4), he shall be reassigned or separated under the regulations prescribed by the United States Civil

Service Commission to carry out sections 3501-3503 of title 5.

(6) If there is a termination of or material change in the activity in which the former position of the employee (referred to in paragraph (1) of the subsection) was located, he shall beplaced, in the manner provided by paragraphs (2), (3), and (4), as applicable, of this subsection, in a position in the department concerned in a geographical area other than the geographical area in which such former position was located.

(d) Each employee who is placed in a position under paragraph (1), (2), (3), (4), or (6) of subsection (c) of this section shall be paid at a rate of basic compensation which is not less than the rate of basic compensation to which he would have been entitled if he had not been assigned to duty outside the United States.

(e) (1) Each employee who is displaced from a position by reason of the exercise of a return right under subsection (c)(1) of this

section shall be placed, as of the date of such displacement, without reduction in seniority, status, and tenure, in a vacant existing position or new continuing position, for which he is qualified, available in the department concerned, in the same geographical area as, with rights and benefits equal to the rights and benefits of, in a grade equal to the grade of, and at a rate of basic compensation not less than the last rate, of basic compensation to which he was entitled while in the position from which he is displaced.

(2) If the employee cannot be placed in a position under paragraph (1) of this subsection, he shall be reassigned to a position other than the position from which he is displaced, or separated, under the regulations prescribed by the United States Civil Service Commission to carry out sections 3501-3503 of title 5.

(f) The President may, upon his determination that such action is necessary in the

national interest, declare that, for such period as he may specify, an assignment of an employee to duty in Alaska or Hawaii shall be held and considered, for the purposes of this section, to be an assignment to duty outside the United States.

(g) For the purposes of this section--

(1) "rotation" means the assignment of civilian employees referred to in subsection (b) of this section to duty outside the United States and the return of such employees to duty within the United States; and

(2) "grade" means, as applicable, a grade of the General Schedule as prescribed in section 5104 of title 5 or a grade or level of the appropriate prevailing rate schedule.

APPENDIX

Item 5

February 24, 1977 letter from Major Pettingill to Mr. Harris:

24 February 1977

SUBJECT: Directed Return to Position in United States

Mr. Jess C. Harris
AAF Division
USACEEIA-EUR
APO 09056

1. You are directed to exercise your reemployment rights and return to the position you occupied prior to your reassignment overseas on 17 January 1972. The position is Communications Specialist, GS-0393-12, Project Management Office, F. Huachuca, Arizona 85613.

2. The reasons for directing you to return to your former position in CONUS are as follows:

a. By agreement (Incl 1) signed at Ft. Huachuca on 5 January 1972 you were given reemployment rights to the position mentioned

in paragraph 1, above, for a 36 months period and any extension approved thereto, up to an aggregate of five years. The extension of your overseas service and reemployment rights to 17 January 1977 were approved by supplemental agreement (Incl 2), which you signed on 30 April 1975.

b. Extension of your overseas tour and reemployment rights expired on 17 January 1977; however, you were authorized a delay for personal reasons through 17 February 1977 by Ft. Huachuca. You were previously informed that you were expected to apply to exercise your reemployment rights upon expiration of the five year period in accordance with the provisions of the agreement which you signed, para 2a, above.

c. As of this date, you have made no effort to arrange for the administrative details necessary for you to exercise your employment rights and return to your former position in Ft. Huachuca, i.e., requesting

travel orders and a port call from the Mannheim Area CPO.

3. For the above reasons, you are directed to make the necessary arrangements to exercise your reemployment rights by reporting to the Mannheim Area COP, Turley Barracks, Mannheim, Technical Services Branch, not later than 7 March 1977 to request transportation to Ft. Huachuca and satisfy the conditions of your assignment overseas as specified in the agreement you signed on 5 January 1972. You may telephone Mrs. Elizabeth Krug, Chief, TSP, at Mannheim Military (2131-) 6632, to assist you in making the necessary administrative arrangements for your return to CONUS.

4. Failure to report to the Mannheim Civilian Personnel Office and/or to submit a written request for transportation and travel orders (Incl 3) to Ft. Huachuca to exercise your reemployment rights by 1 March 1977, will be construed as a refusal to accept

assignment to your former position in CONUS, which would carry out the terms of your re-employment rights agreement. Such action on your part will result in a proposal to separate you from the Federal Service.

5. If you have any questions or need further assistance concerning this matter, please contact Mrs. Krug of the Mannheim Area COP, as stated in para 3, above.

ALBERT R. PETTINGILL
MAJ, Sig C
Chief, AAF Division

APPENDIX

Item 6

March 30, 1977 letter from Lutz B. Hoernecke to Major Pettingill (set out in material part):

Major Albert R. Pettingill
Chief, AAF Division
Department of the Army
HQ, U.S. Army Communications - Electronics
Engineering Installation Agency, Europe
APO 09056

Subject: Notice of Proposed Removal - Mr. Jesse C. Harris

1. This is in reference to your letter dated 18 March 1977 proposing to remove Mr. Jess C. Harris.

2. Your letter asserts that employee has failed to accept assignment to his former position in CONUS in a reemployment rights agreement. Your position is not correct. By letter dated 1 December 1976, employee requested a 120 day delay in travel to CONUS, in order to obtain all the necessary immigration documents for his foreign born wife. By letter dated 6 December 1976, the request for

a 120 day delay in travel was denied by the Government. An inadequate 30 day delay was granted. By letter dated 2 March 1977, a renewed request for a 120 day delay in travel was filed by our office. This request was again denied by letter of 21 March 1977.

3. The refusal to grant employee's repeated requests for a reasonable delay in travel was erroneous. The employee is entitled to a reasonable delay in travel if such delay is necessary to avoid undue hardship to employee. The employee's request for a delay in travel was necessary. The employee showed that additional delay in travel was needed in order to obtain documents needed for the processing of his wife's application for an immigrant visa to the United States. Employee noted that such necessary documents included certificates from foreign countries including Syria and the Soviet Union, as well as necessary translations thereof. Thus, the request for a delay in travel was clearly

justified. Denial of employee's request entailed undue hardship to the employee. Employee showed that his wife did not have sufficient command of the English and German languages to enable her to obatin the immigration visa herself. Further, employee's separation from his wife, which would result from his transfer to CONUS prior to the approval of her immigrant visa, would cause undue hardship to employee and his wife. Accordingly, the allegation in the Notice of Proposed Removal that employee refused to accept assignment to CONUS, is without basis. Quite to the contrary, employee was in the process of taking necessary action to enable him and his wife to return to CONUS as is demonstrated by his request for a delay in travel.

4. * * *.

5. Referenced agreement further provides reemployment rights for the employee but does not necessarily require the exercise of such reemployment rights. The clause provides

that failure by employee to exercise reemployment rights may result in action directing his return to his former position. The wording of the clause thus clearly vests discretion in the Government by use of the word "may." Discretion vested in the Government must be exercised reasonably and can not be exercised capriciously or arbitrarily. In this case, the Governmenthas not exercised reasonable discretion. There continues to be a need for employee's services in his present position. In fact, a replacement must be recruited to fill his position. The Government, however, has failed to consider this fact or any other fact or circumstance that may warrant an extension foremployee. The Government has directed employee's return merely because of the expiration of the arbitrary 5 year limit. Thus, the Government has failed to act in accordance with the agreement as drafted by the Government, which requires the exercise of discretion in

determining whether or not to direct employee's return.

6a. It is further our position that the "five year rule" cannot be applied to employee, because the Congressional statute upon which such action would be based is unconstitutional and the regulations which have been drafted to implement that statute are null and void because they exceed the delegation of authority contained in the statute which they purport to implement.

b. * * *.

c. * * *.

d. * * *.

e. * * *.

f. The "five year rule" purports to be based upon Public Law 86-585 (10 U.S.C. §1586). That statute provides in pertinent part that it is "the policy of theCongress to facilitate the interchange of civilian employees of the Defense Establishment between posts of duty in the United States and posts of duty

outside the United States through the establishment and operation of programs for the rotation, to the extent consistent with the missions of the Defense Establishment and sound principles of administration, of such employees who are assigned to duty outside the United States." This policy is to be executed by the granting of a right to return to a position in the United States. The statute thus provides that "the Secretary of Defense with respect to civilian employees of the Department of Defense other than employees of a military department, and the Secretary of each military department with respect to civilian employees of such military department, amy, under such regulations as each such Secretary may prescribe with respect to the employess concerned and in accordance with the policy and other provisions of this section, establish and operate programs of rotation which provide for the granting of the right to return to a position in the United States to each

civilian employee in the department concerned." The statute makes no provision for an arbitrary and mandatory system of rotation.

g. The legislative history further clearly shows that Congress intended to aid public employees overseas by granting return rights which said employees did not theretofore have and did not intend to arbitrarily and mandatorily limit their residence overseas. The Senate Report describes the statute's purpose by stating that:

> "Its basic purpose is to authorize the Secretary of Defense and the Secretaries of the military departments to grant return rights to career and career conditional civilian employees assigned to posts outside the United States."
>
> ". . . because of the vital necessity for obtaining personnel of the highest possible ability and character to remedy a serious personnel problem which has

arisen out of current provisions for civilian Defense employees overseas. Under present law, they have no re-employment rights to positions in the United States upon completion of their foreign duty."

"The military departments have testified that the presentlack of return rights constitutes the major reason why employees will not accept assignments abroad." (1960 U.S. Code Congressional and Administrative News 2670)

h. It is well established by statute and case law that a regulation which exceeds the delegation of authority in a statute is null and void. The Administrative Procedure Action, Section 9(a) provides that:

"No sanctions shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law."

The courts have similarly held:

"A regulation must be rationally related to the purpose of the statute."
Pan American Petroleum Corporation v. FPC 18 Ad L. 2d 29 (1965)

The Department of the Army Civilian Personnel Regulation 352.8 provides an arbitrary restriction of five years on the length of service of a public employee overseas. The regulation pruports to derive its authority from Public Law 86-585.

Public Law 86-585, however, clearly cannot be the authority for this regulation. The wording and legislative history of this statute provide, as shown above, for a granting of a <u>right to return</u> but not for the establishment of a requirement to return. There is no other statute that provides adequate authority for the implementation of a regulation establishing the requirement of a public employee to return to CONUS at the expiration of a period of five years of service overseas.

7a. In consideration of the above, we request that employee be granted a reasonable delay in travel as previously requested by letters of 1 December 1976 and 2 March 1977. We further request that the Government exercise discretion in reexamining whether to direct employee's return to his former position.

b. In the event the Government does not act favorably on the above, we request that the Government's direction to employee to return to CONUS be permanently rescinded because the regulation on which the direction is based it null and void since it exceeds the delegation of authority in the statute and the statute, if interpreted to provide a basis for the regulation, is unconstitutional.

LUTZ B. HEORNECKE
Representative for
Mr. Jess C. Harris

APPENDIX

Item 7

April 18, 1977, memorandum from Col. O'Brien regarding Mr. Hoernecke's March 30, 1977, letter to Major Pettingill [set out in material part]:

18 April 1977

SUBJECT: Consideration of Reply to Notice of Proposed Removal - Mr. Jess C. Harris

MEMORANDUM FOR RECORD

1. References:

a. Letter, CCCE-AF, 24 Feb 77, subject: Directed Return to Position in CONUS.

b. Letter, CCCE-AF, 19 Mar 77, same subject.

c. Letter, CCCE-C, 21 Mar 77, subject: Request for Delay in Travel.

d. Letter from law offices of Hoernecke, Hart, and McFadden, 30 March 1977, which replied to Maj. Pettingill concerning the Notice of Proposed Removal.

2. The following comments address specific paragraphs contained in reference 1d above.

a. Paragraphs 2 and 3, reference 1d. Paragraphs 2 and 3 of ref 1c above explained the rationale and preliminary requirements which Mr. Harris had to meet before any further request(s) for delay in travel beyond the 30-day extension would be considered, i.e., application to exercise his reemployment rights to return to CONUS by submitting to CPO the completed request for travel orders and signing any other required documents, (e.g., a minimum one-year transportation agreement). The required actions described above which Mr. Hess was directed to complete in response to ref 1a were not accomplished by him.

b. ***.

c. Paragraph 5, reference 1d. In accordance with the provisions contained in Mr. Harris' reemployment rights agreement which was signed by him, the procedures

contained in CPR 352.8 and FPM Supplement 752-1 were followed in directing Mr. Harris' return to his former position in CONUS. It is believed that reasonable discretion was exercised in directing his return to CONUS since he refused to voluntarily return (he stated this fact orally to his supervisor on 1 February 1977). Prior to directing Mr. Harris's return to CONUS, it was determined that circumstances did not exist which would have warranted requesting an extension of Mr. Harris' services beyond the five-year overseas limitation period. Therefore, recruitment was initiated to fill his position, as is the normal practice in these situations. Mr. Harris' supervisor's directive to him to return to his former position in CONUS was reviewed and considered warranted as previously communicated in writing to the employee.

d. Paragraph 6a - 6h, reference 1d. The undersigned is not in a position to

question the constitutionality of the re-employment rights regulatory provisions or the five-year foreign area service limitation. Therefore, no action can be or will be taken at this time to make a determination contrary to this agency's policy concerning these respective areas.

e. Paragraphs 7a and 7b, reference 1d. Paragraphs 2 and 3 of this MFR have already addressed the subject of considering any further requests for delay in travel once Mr. Harris had applied to exercise his reemployment rights by completing the necessary forms to accomplish this process. Since Mr. Harris refused to accept assignment to return to his former position in CONUS in accordance with the terms of his reemployment rights agreement (i.e., he failed to exercise his reemployment rights and failed to comply with the directive which requested him to do so) which would carry out the provisions of the Department

of the Army's rotation program. The undersigned finds that the basis for the proposed removal action is fully sustained and warrants his removal from Federal service.

GEORGE F. O'BRIEN
Colonel, Sig C
Commanding